Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

August 25, 1992

Mr. Jeff Hankins
Legal Assistant
Texas Department of Insurance
Program Division, Legal Services 110-1C
P. O. Box 149103
Austin, Texas 78714-9104

OR92-467

Dear Mr. Hankins:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 16243.

The Texas Department of Insurance (the "department") received a request for the flex-rate filings for homeowners and private passenger auto insurance filed with the department by State Farm Insurance Companies (State Farm). In accordance with Texas Insurance Code article 5.101, the department requires insurance companies that write property or casualty insurance for certain lines of insurance to file proposed rates and supporting information. The department has taken the position that the requested information is not confidential and should be released. State Farm has advanced arguments that a portion of the filings, the premium information for homeowners insurance coverages collected by State Farm companies in 1991, is exempt from disclosure under sections 3(a)(1), 3(a)(4), and 3(a)(10) of the Open Records Act. We have also received briefs from the Office of Public Insurance Counsel urging that the premium information is not exempt from disclosure under the Open Records Act.

Section 3(a)(4) protects "information which, if released, would give advantage to competitors or bidders." The purpose of this exception is to protect a governmental body's purchasing interest by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders. Open Records Decision No. 592 (1991). It is designed to protect the interests of a governmental body, not that of a private party. *Id.* It requires a showing of some actual

competitive harm in a particular competitive situation. *Id.* Section 3(a)(4) is clearly inapplicable to the information at issue.

Section 3(a)(1) excepts from required disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." In raising this exception, State Farm offers no argument that is distinct from its trade secret claim under section 3(a)(10). We will therefore resolve the 3(a)(1) claim by our decision regarding the application of section 3(a)(10) to the information at issue, as discussed below.

Section 3(a)(10) of the Open Records Act exempts from public disclosure information that is a trade secret. The determination of whether any particular information is a trade secret under Texas law is a fact question. Open Records Decision No. 552 (1990). In determining whether information constitutes a trade secret for purposes of exemption from disclosure under section 3(a)(10), this office relies on the definition of trade secret from the Restatement of Torts, section 757 (1939), which is the definition the Texas Supreme Court adopted in *Hyde Corp. v. Huffines,* 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U. S. 898 (1958). *See id.* at 2. The Restatement of Torts defines a trade secret as

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process for manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

This office considers six factors in determining whether particular information constitutes a trade secret:

> 1) the extent to which the information is known outside of [the company's] business;
>
> 2) the extent to which it is known by employees and others involved in [the company's] business;
>
> 2) the extent of measures taken [by the company] to guard the secrecy of the information;

4) the value of the information to [the company] and to [its] competitors;

5) the amount of effort or money expended [by the company] in developing this information;

6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

Whether one of the trade secret factors by itself can confer trade secret status depends on the information at issue. *See* Open Records Decision No. 552 at 3. Counsel for State Farm argues with respect to one of the trade secret factors, the value of the information to its competitors:

> The dollar amount of direct written premium collected by State Farm companies in 1991, broken down by territory, provides a blueprint for State Farm's market strategies and policyholder base: a competitor could easily derive from the data, presented in this form, a clear picture of where State Farm markets, and what share of that market State Farm has. A comparison of premium distribution with applicable rates within territories also provides a good basis for deducing concentrations of business according to classification (or degree of risk), as well as territory. If disclosed, the premium distribution information in these exhibits would therefore provide competitors access to State Farm's business judgments, based on its own experience, of the optimum marketing areas of the state and targeted consumer groups.

Brief (May 13, 1992) at 3. As for the other trade secret factors, State Farm informs us that it requested that the premium distribution information be kept confidential when it submitted the information to the department. State Farm supplied no facts in regard to the other trade secret factors.

While the department has taken the position that the information should be released since it is not made confidential by statute, it has not specifically addressed the trade secret issue of the value of the information to State Farm's competitors.

The chief economist of the Office of Public Insurance Counsel, however, disputes State Farm's assertion that the information is valuable competitive information. State Farm has rebutted the arguments of the Office of Public Counsel.

This office cannot resolve disputes of facts in the opinion process. *See* Open Records Decision No. 552 at 4. State Farm's argument that the premium-by-territory data constitutes a trade secret is primarily based on its assertion that such information can be used by its competitors to deduce its marketing strategy. This assertion is refuted by the Office of Public Insurance Counsel. The issue of the value of this information to State Farm's competitors is not resolvable as a matter of law or from the information itself. Where fact issues are not resolvable as a matter of law or ascertainable from the face of documents submitted for our inspection, this office must rely on the representations of the governmental body requesting our opinion on whether information constitutes a trade secret. *Id.*; *see* Open Records Decision No. 426 (1985).

The department has not expressly addressed the issue of whether the flex-rate filing information constitutes a trade secret. We therefore defer ruling on this issue at this time. We refer this question back to the department to make findings on the issue of whether the flex-rate filing information constitutes a trade secret. If the department makes a finding that this information constitutes a trade secret, it must be withheld. If the department determines that this information does not constitute a trade secret, it must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-467.

Yours very truly,

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Opinion Committee

KHG/lmm

Ref.: ID# 15601
ID# 16243
ID# 16695
ID# 16721
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OR92-245

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